93-707

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RALPH CONDO,

Petitioner,

v.

SYSCO CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the Petitioner's contract of employment, by which he was paid less than one-half time for each hour he worked in excess of forty hours, be reconciled with the Fair Labor Standards Act, Title 29 U.S.C. §207(a), which expressly requires that

> [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate no less than one and one-half times the regular rate at which he is employed.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I.	
THE SEVENTH CIRCUIT'S OPINION CONFLICTS DIRECTLY WITH THE TERMS OF THE STATUTE, AND IS IN CONFLICT WITH THE RULE OF THE EIGHTH CIRCUIT	6
II.	
THE SEVENTH CIRCUIT'S OPINION ELIMINATES THE PROTECTION AFFORDED CONTRACT EMPLOYEES BY THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT	8
CONCLUSION	10

APPENDICES

A—Seventh Circuit Opinion, August 4, 1993 ... A-1

B—District Court Memorandum Opinion and Order, October 26, 1993 ..... B-1

C—Federal Regulation 29 C.F.R. §778.114, *Fixed salary for fluctuating hours* C-1

D—Federal Regulation 29 C.F.R. §778.403, *Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f)* D-1

E—Plaintiff's Employment Contract with Defendant E-1

TABLE OF AUTHORITIES

Cases	PAGE
Foremost Dairies v. Wirtz, 381 F.2d 653 (5th Cir. 1967)	9
Haynes v. Tru-Green, 154 Ill.App.3d 967 (1987)	4, 5
Marshall v. Hamburg, 577 F.2d 444 (8th Cir. 1978)	6, 10
Martin v. Tango's Restaurant, 969 F.2d 1319 (1st Cir. 1992)	8
Overnight v. Missel, 316 U.S. 572, 86 L.Ed. 1682 (1942)	8, 10
Walling v. A.H. Belo, 316 U.S. 624 (1942)	4
Yadav v. Coleman Oldsmobile, 538 F.2d 1206 (5th Cir. 1976)	4, 5

Statutes and Regulations

29 U.S.C. §207(a)	i, 2
29 U.S.C. §207(f)	2
29 C.F.R. §778.114	*passim*
29 C.F.R. §778.403	2, 6, 7, 8, 10

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Ralph Condo respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 1 F.3d 599, 62 USLW 2107, and 1 Wage & Hour Cas. 2d (BNA) 904; It is reproduced as Appendix A to this Petition. The opinion of the District Court for the Northern District of Illinois is reported only in Westlaw, as document 1992 WL 317199, and is reproduced herein as Appendix B.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals (Appendix A), was entered August 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The Fair Labor Standards Act, 29 U.S.C. §207(a):

> [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate no less than one and one-half times the regular rate at which he is employed.

The Fair Labor Standards Act, 29 U.S.C. §207(f):

> No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract . . . if the duties of such employee necessitate irregular hours of work and the contract or agreement (1) specifies a regular rate of pay . . . and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Federal Regulation, Chapt. 29, C.F.R. §778.114: *Fixed salary for fluctuating hours* (Text in Appendix C).

Federal Regulation, Chapt. 29, C.F.R. §778.403: *Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f)* (Text in Appendix D).

STATEMENT OF THE CASE

This case began as an action by Ralph Condo to recover overtime wages from the Defendant SYSCO, his ex-employer, under both the Fair Labor Standards Act, 29 U.S.C. §7(a) and Chapter 48, Ill.Rev.Stat. §1004(a)(1), the Illinois state law equivalent. It was filed in the Circuit Court of Cook County, Illinois, but removed to the United States District Court for the Northern District of Illinois under the provisions of Title 28 U.S.C. §1441. Appeal was taken from that court to the Seventh Circuit Court of Appeals pursuant to Title 28 U.S.C. §1291.

In these proceedings, Mr. Condo contends that he is entitled to "time-and-a-half" for the hours he worked in excess of 40 each week, pursuant to the Fair Labor Standards Act. The parties agree that Mr. Condo worked such hours, and agree that he received payment for these overtime hours at a rate of less than "one-half time". The parties agree that Defendant's formula for computing such overtime wages was expressly stated in Mr. Condo's written contract. Defendant contended, successfully in the courts below, that despite the wording of the Fair Labor Standards Act, and despite the failure of the contract to qualify for the sole statutory exception cited hereinabove, the reduced overtime payments were permitted instead by a Federal Regulation, Chapt. 29, C.F.R. §778.114: *Fixed salary for fluctuating hours* (Appendix C herein).

Because the facts of the case were uncontested, the case was presented to the trial court on cross motions for summary judgment. The facts submitted consisted of the following:

1. Plaintiff was hired by the Defendant pursuant to a written contract, copied and included herein as Appendix E. Plaintiff's duties were to drive the com-

pany limousine as chauffeur for the Chairman of the Board and, when not performing the chauffeur function, to work in the company mail room at such tasks as were necessary.

2. The express terms of the contract set Mr. Condo's overtime hourly pay at less than one-half the hourly rate at which his first 40 hours' work of each week was calculated.

3. The Defendant employer always made certain that there was a full 40 hours' work for Mr. Condo to do each week, whether driving or working in the mail room. There were no weeks when Mr. Condo worked less than the basic 40 hours, although there were a few weeks that he did not work overtime.

The trial court held that Plaintiff's overtime payment formula did ***not*** violate the Fair Labor Standards Act because it was not inconsistent with the interpretation given 29 C.F.R. §778.114 by an Illinois case, *Haynes v. TruGreen*, 154 Ill.App.3d 967, which case followed the Fifth Circuit's ruling in *Yadav v. Coleman*, 538 F.2d 1206. These cases hold that 29 C.F.R. §778.114 authorizes the formula used for computation of Mr. Condo's overtime pay. The court accordingly denied Plaintiff's motion for summary judgment and granted summary judgment instead for the Defendant. The case was then appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit acknowledged that the sole *statutory* exception to the time-and-one-half requirement of §7(a) of the Fair Labor Standards Act is §7(f), which was added to the statute in response to this Court's decision in *Walling v. A.H. Belo*, 316 U.S. 624. Under §7(f) an employer may lawfully pay an employee less than one-half time for hours worked in excess of forty per week when

he is employed to work "irregular hours", meaning work weeks which vary between periods of more than and less than forty hours, in situations where "irregular hours" are required by the nature of the job. The regulations and case law interpret the statutory exception as providing a *quid pro quo*: the employee is guaranteed a full forty hours' pay even if he does not work the full forty hours. On the other hand, since his agreement is for a fixed sum for *all* hours he works during the work week, his hours in excess of forty are considered to have been paid by the fixed weekly sum. He is still entitled to an overtime premium for these additional hours, but the employer owes only the "one-half"; the "time" part of the mandated "time-and-one-half" is considered paid by the fixed guaranteed weekly sum.

Since the "hourly rate" is determined by dividing the weekly guaranteed amount by the total hours worked, including overtime hours, half of this hourly rate is necessarily somewhat less than half the rate at which the first forty hours would have been computed, had there been no overtime.

However, both parties agree, as did the Seventh Circuit, that the statutory §7(f) exception *cannot* apply to Mr. Condo's job for at least two reasons: his hours of work did not fluctuate both above and below the forty-hour-per-week limit, nor did the nature of his job require such irregular hours. Instead, Defendant SYSCO relied upon 29 C.F.R. §778.114 as providing different and independent exception to the "time-and-one-half" mandate of §7(a). The Seventh Circuit has now agreed, citing the Illinois Appellate Court's decision *Haynes v. Tru-Green*, and the Fifth Circuit's opinion, *Yadav v. Coleman Oldsmobile*, 538 F.2d 1206 (5th Cir. 1976).

Both decisions, however, are contrary to the Eighth Circuit in *Marshall v. Hamburg*, 577 F.2d 444 and contrary to the express terms of 29 C.F.R. §778.403 (Appendix D herein).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S OPINION CONFLICTS DIRECTLY WITH THE TERMS OF THE STATUTE, AND IS INCONSISTENT WITH THE RULE OF THE EIGHTH CIRCUIT.

The overtime pay limitations of Ralph Condo's contract with Defendant SYSCO, while valid in the Fifth and Seventh Circuits, are unenforceable in the Eighth Circuit. In *Marshall v. Hamburg*, 577 F.2d 444 (8th Cir. 1978), the court examined and condemned a written contract with identical overtime computation provisions; that contract stated:

> It is our understanding that my weekly salary of $118.40 per week is to cover what ever hours I work in any one work week and that all hours over 40 in any one work week will be computed as extra half time and that I will be guaranteed no less than 45 hours in any one work week.
>
> Example of computing extra half time for overtime:
>
> Salary $100 Hours Worked 50
> 50 hours $100 = hourly rate of $2.00
> ½ of hourly rate of $2.00 = $1.00 extra half time.
> Salary for 40 hours $100.00
> 10 extra half time hours at $1.00/hr 10.00
> Total gross wage $110.00

As in Mr. Condo's case, the result is that the employee's overtime hours are paid at somewhat less than half the rate of the first forty. In the Fifth Circuit's example above, forty hours' work for the agreed $100 would be

$2.50 per hour. One-half that amount, had the overtime hours not been figured into the weekly rate, would be $1.25 instead of $1.00.

As in Mr. Condo's case, the Fifth Circuit noted that the §7(f) statutory exception was not available to the employer because the employee's "irregular hours" occurred only in his overtime periods, and, further, that the nature of the job was not such that irregular hours were necessary. The defendant argued instead that the contract was permissible under 29 C.F.R. §778.114, and argued, as in the present case, that the regulation excused the contract's inconsistency with §7(a) of the Act (The time-and-a-half requirement), even if the §7(f) exception could not apply.

But the Eighth Circuit Court cited regulation 29 C.F.R. §778.403 (Appendix D herein), titled: *Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f)*, and noted that "It is apparent that §778.114 is not intended to validate a plan implementing a fixed guaranteed income which includes overtime pay."

In the present case, the Court of Appeals declined to discuss either *Marshall v. Hamburg*, or §778.403. It held instead that the interpretation of regulation §778.114 urged by Defendant SYSCO in the District Court was within the authority delegated to the Secretary of Labor, and was based on a permissible construction of §7(a) of the Act.

But the language of the Regulation 778.114 (Exhibit C herein) does not purport to be a grant of authority. Both courts below failed to acknowledge that the regulation is but part of a chapter of the regulations titled "*PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE 'REGULAR RATE'* ". §778.114 by its terms purports

to do nothing more than demonstrate the necessary arithmetic to determine overtime pay under a permissible "fluctuating hours" contract, which would necessarily be a §7(f) contract. It explains the fact that the employee has already received his "straight time" compensation for his overtime hours, and need only be paid the "half time" premium to which he is additionally entitled under §7(a). It is a summary and restatement of the language of *Overnight v. Missel*, 316 U.S. 572, 86 L.Ed. 1682, which set forth these concepts for application of the §7(f) *Belo* exception. The First Circuit Court of Appeals observed that: "*Overnight*'s . . . formula is in fact reflected in the Secretary's regulations for computing overtime compensation in the case of employees paid a 'fixed salary for fluctuating hours,' 29 C.F.R. §778.114." *Martin v. Tango's Restaurant*, 969 F.2d 1319, 1324 (1st Cir. 1992).

The literal terms of the regulation do not purport to create a new non-statutory exception to the clear time-and-one-half mandate of §7(a). Only by viewing 778.114 as a restatement of *Overnight v. Missel* can it co-exist consistently with §778.403, which states clearly that the statutory exception at 7(f) is the *only* exception to 7(a).

II.

THE SEVENTH CIRCUIT'S OPINION ELIMINATES THE PROTECTION AFFORDED CONTRACT EMPLOYEES BY THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

This case presents an issue well worthy of this Court's attention because it allows employers in the Seventh (and Fifth) Circuits to lawfully pay less than one-half-time for overtime hours to any employees who (1) have written contracts, (2) work varying amounts of overtime from week to week, and (3) are guaranteed a fixed weekly wage

for all hours worked, even if they *never* have work weeks of less than forty hours. Under the Seventh Circuit's ruling, any wage-earning employees willing to accept work on such terms could and would have their overtime wages so reduced.

In 1967, the Fifth Circuit itself observed the importance of denying the statutory 7(f) exception to workers whose variations in work hours occurred only in their hours which exceeded forty in a work week. In *Foremost Dairies v. Wirtz*, 381 F.2d 653, 5 ALR Fed. 779, the court stated:

> [W]hen logically applied, appellant's contention that the fluctuation in the workweek hours need occur only in overtime hours would make it rather easy to substitute (Section 7(f)) contracts for virtually all employees and thereby strike at a vital provision of the Act, Section 7(a).
>
> If the fluctuation of hours in average workweeks varies only in overtime hours, there is not such irregularity of hours, in our view, as would justify our holding that individual employment contracts under (Section 7(f)) are valid. Where employees regularly work at least the maximum number of hours per workweek permitted without overtime pay being due under Section 7(a), and any irregularity of fluctuation in workweek hours occurs only in hours over the maximum, in overtime hours, such fluctuation does not constitute "irregular hours of work" and Belo contracts with such employees are invalid under (Section 7(f)). 5 ALR Fed. at 791.

These same considerations weigh against the Seventh Circuit's interpretation of Regulation 778.114; if an employer is allowed to employ workers in overtime hours for less than the cost of hiring others to work regular hours, the entire purpose of the overtime requirements of the Fair Labor Standards Act is subverted. A fundamental purpose of the Fair Labor Standards Act was to

encourage employers to distribute work among a larger number of employees rather than to work employees overtime. The primary means of achieving this goal was the general requirement set out in 7(a) of the Act, that employees be compensated for overtime hours at a rate not less than one and one-half their regular compensation. *Marshall v. Hamburg*, 577 F.2d 444, 446. This Court, in *Overnight v. Missel*, observed that "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning." 316 U.S. at 578. The opinion of the court below is in direct conflict with these principles.

CONCLUSION

Neither the District Court nor the Seventh Circuit discussed §778.403, which identifies §7(f) as the only exception to the mandate of §7(a). Yet their opinions hold that contracts impermissible by the terms of §7(a) and unexcused by §7(f) are still valid under Regulation 778.114. Such a holding is contrary to the purposes of the Fair Labor Standards Act and unwarranted by its terms. Ralph Condo, the plaintiff, and the undersigned, as his counsel, accordingly pray this Court to examine the issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3684

RALPH CONDO,

Plaintiff-Appellant,

v.

SYSCO CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 802—**John F. Grady**, *Judge.*

ARGUED APRIL 16, 1993—DECIDED AUGUST 4, 1993

Before COFFEY, EASTERBROOK, and ROVNER, *Circuit Judges.*

COFFEY, *Circuit Judge.* Ralph Condo sued his employer, Sysco Corporation, claiming that Sysco's practice of paying him a fixed salary for all hours worked and one-half of his hourly rate for each hour that he worked overtime violated § 7(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 207(a)(1) (1988), and its equivalent under Illinois law, 80 ILCS 105/4a(1) (1993). The district court entered summary judgment in favor of Sysco, and we affirm.

I. BACKGROUND

On March 23, 1984, Condo entered into a written employment contract with Sysco Corporation. Under the terms of the contract, Condo's duties were serving as chauffeur for Sysco's chairman of the board and working in the company's mail room. The job entailed significant overtime. In exchange for his services, Condo received a fixed salary of $400 per week for all hours worked plus overtime pay for all hours worked in excess of forty. The amount of overtime pay was calculated by dividing Condo's fixed weekly salary of $400 by the total number of hours that he worked each week to yield an hourly rate of pay for the workweek. All hours that Condo worked in excess of forty were compensated at fifty percent of this hourly rate. For purposes of clarification, the employment contract included illustrations of how Condo's overtime pay was to be calculated.[1]

Condo was paid for his services in accordance with the terms of this contract from March 23, 1984, until October 2, 1986.[2] In March of 1991 Condo brought an action against Sysco, alleging that the system it had used to calculate his compensation violated § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988), and the parallel section of the Illinois

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[1] For example, the chart illustrated how Condo's total salary for weeks during which he worked for fifty hours would be $440: For fifty-hour workweeks (as for all workweeks) Condo's base pay would be $400. Overtime pay would be one-half of the hourly rate (i.e., ½ of fifty hours divided into $400, or $4.00), multiplied by the ten hours of overtime worked, which results in a sum of $40.00. This overtime pay added to the base pay results in the total weekly salary of $440. For sixty-hour weeks, the chart explained that Condo's total salary would be $400 + (½ ($400/60 hours)) × 18 hours, or $466.60. The chart also provided examples for workweeks of fifty-eight hours, fifty-five hours, forty hours, and fifty-three hours.

[2] On October 2, 1986, Sysco fixed Condo's hourly rate for regular time at $9.00 and his hourly rate for overtime at one and one-half of this figure, or $13.50.

Minimum Wage Law, 80 ILCS 150/4a(1) (1993). Section 7(a)(1) of the FLSA provides that an employee shall not be employed for more than forty hours in a given week unless the employee receives compensation for all hours in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed." The language of the Illinois law is substantially the same. Condo argued that the system of payment for overtime in the contract violated the federal and state laws because under the system he was paid for his overtime hours not at a rate of one and one-half times his hourly rate of pay as is mandated by these laws, but rather at a rate of only one-half his hourly rate of pay. Each party moved for summary judgment, and the district court entered judgment in Sysco's favor. The court found that the system of payment was consistent with § 7(a)(1) of the FLSA and its counterpart under Illinois law, and furthermore, that the system was explicitly authorized by 29 C.F.R. § 778.114 (1992), a regulation promulgated by the Department of Labor to help explain § 7(a), and by Illinois Administrative Code tit. 56, § 200.420(f) (1991), the corresponding state regulation. This appeal followed.

II. DISCUSSION

On appeal, Condo contends that summary judgment in favor of Sysco was inappropriate because the district court incorrectly concluded that the system used by Sysco to compensate him for working overtime complied with § 7(a)(1) of the FLSA.[3] We review issues decided on summary judg-

[3] The parties agree that § 7(a)(1) of the FLSA and § 4a(1) of the Illinois Minimum Wage Law are coextensive and, therefore, if the system used by Sysco to compensate Condo for working overtime complies with the FLSA, it also complies with Illinois law. The Illinois Administrative Code supports this proposition, *see* ILL. ADMIN. CODE tit. 56, § 200.170 (1991), as does Illinois case law. *See Haynes v. Tru-Green Corp.*, 507 N.E.2d 945, 951 (Ill. App. 1987). Accordingly, we frame our analysis (as the parties have framed theirs) in terms of whether the system complies with the FLSA.

ment *de novo* and resolve all reasonable inferences in favor of the nonmoving party. *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The parties agree that Condo was paid for working overtime in accordance with the employment contract and that the system of payment used by Sysco is the system enumerated in 29 C.F.R. § 778.114. The only points of contention are whether the district court correctly concluded that § 778.114 applies to this case and, if so, whether the regulation is lawful.

A. *Does section 778.114 apply to this case?*

Section 778.114 provides that a salaried employee whose hours of work fluctuate from week to week may reach a mutual understanding with his employer that he will receive a fixed amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or many, and that he will be compensated for his overtime work at a rate of fifty percent of his regular hourly pay. 29 C.F.R. § 778.114(a). The regular hourly pay is calculated by dividing the employee's regular, weekly pay by the total number of hours that he worked during the week. *Id.* The fixed amount must be sufficient to provide compensation at a regular rate of not less than the minimum hourly rate, 29 U.S.C. § 206(a)(1) (1988 & Supp. III 1991), and the overtime premium cannot be less than one-half the regular rate. 29 C.F.R. § 778.114(c).

Each of the requirements of the regulation was satisfied in this case. Condo worked fluctuating hours (although Condo never worked fewer than forty hours each week, the amount of overtime that he worked varied) for a fixed salary. Condo and Sysco had a mutual understanding that

Condo would be paid according to the system that is set forth in § 778.114 and the employment contract.[4] Condo's fixed salary of $400 per week was more than sufficient to provide compensation at a regular rate of not less than the minimum hourly rate. Finally, the overtime premium that Condo received was not less than one-half the regular hourly rate, for the contract states: "You will receive half (½) of the weekly hourly rate on all hours worked in excess of 40 per week."

Condo argues that § 778.114 does not apply to this case because the regulation applies only to employment contracts that are authorized by § 7(f) of the FLSA, 29 U.S.C. § 207(f) (1988), and his contract was not of that type. Section 7(f) provides an exception to § 7(a)'s requirement that an employee who works more than forty hours in a week must receive compensation for working overtime at a rate of at least one and one-half times his regular hourly rate. Under § 7(f), if an employee's hours of work are "irregular," his employer can pay him a guaranteed salary of an amount that compensates overtime for up to sixty hours per week. The salary cannot fall below the statutory minimum hourly rate, and the employer must pay one and one-half times the employee's weekly rate for hours in excess of the agreed-upon workweek. 29 U.S.C. § 207(f).

The parties (as well as the district court) agree that § 7(f) is irrelevant to this case because Condo's duties did

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[4] Condo argued in the district court that the manner in which his wages were calculated was never clear to him, but he has abandoned that argument on appeal. The district court concluded that Condo understood how he was to be compensated for working overtime. In reaching its conclusion, the court found undisputed facts indicating that Condo understood that his job required varying periods of overtime and that the more overtime he worked, the less he would be paid for it. The court found it significant that Condo had signed the written contract, and that the contract contained a chart illustrating precisely how Condo's overtime pay would vary in relation to the number of hours that he worked each week.

not necessitate "irregular hours of work" within the meaning of the provision. The regulations make it clear that an employee's hours of work cannot be considered "irregular" for purposes of § 7(f) unless both his nonovertime hours and his overtime hours fluctuate. *See* 29 C.F.R. §§ 778.405, 776.405 (1992); *see also Donovan v. Brown Equip. & Tools, Inc.*, 666 F.2d 148 (5th Cir. 1982) (section 7(f) exception does not apply unless the employee's hours fluctuate above and below forty hours per week); *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653, 661 (5th Cir. 1967) (same). Condo's overtime hours fluctuated, but his regular hours did not: he always worked at least forty hours each week. As such, § 7(f) does not apply to Condo. Condo submits that because § 7(f) cannot apply, neither can § 787.114, because the regulation "does nothing more than demonstrate the necessary arithmetic to determine overtime pay under a § 7(f) contract, to explain the fact that the employee has already received his 'straight time' compensation for his overtime hours, and need only be paid the 'half time' to which he is additionally entitled."

We disagree. Condo's position was explicitly rejected by the Fifth Circuit in *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976) (per curiam). There the court found that an employee who had worked a "fluctuating work week" within the meaning of § 787.114, but who had not worked "irregular hours" within the meaning of § 7(f), was entitled to back pay for 1500 overtime hours. *Id.* at 1208. The court stated that "[t]he application of the 'fluctuating work week' formula is not at all dependent upon a finding that the employer is entitled to the exception commonly referred to as the 'Belo' provision."[5] *Id.*

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[5] Section 7(f) is referred to as the "*Belo*" provision because Congress added the provision to the FLSA in 1949 in response to two decisions of the Supreme Court, *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942), and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947).

The Appellate Court of Illinois reached the same conclusion in *Haynes v. Tru-Green Corp.*, 507 N.E.2d 945 (Ill. App. Ct. 1987). Haynes, the employee, never worked fewer than forty hours per week, but worked up to forty hours of overtime per week. Tru-Green paid him by using the system that is described in § 778.114. *Id.* at 946-47. Haynes made substantially the same argument that Condo advances here: the "fluctuating-workweek" regulation should not be applied unless the "irregular hours" requirement of FLSA § 7(f) is satisfied. *Id.* at 949. The court rejected this argument and held that § 778.114 may be applied when an employer does not qualify for the § 7(f) exception. *See also Triple "AAA" Co. v. Wirtz*, 378 F.2d 884 (10th Cir. 1967) (applying § 778.114 where § 7(f) did not apply because employees always worked at least forty hours per week). We find these decisions to be persuasive and reject Condo's invitation to ignore the distinction between § 7(e) of the FLSA and § 787.411.

In sum, § 7(f) cannot apply unless an employee's hours fluctuate both above and below forty hours per week. If § 7(f) does not apply, an employee must be compensated for working overtime in accordance with § 7(a). If § 7(a) applies and the employee's hours fluctuate above but not below forty hours per week, an employer may choose to compensate the employee pursuant to the system that is set forth in § 778.114. The number of hours that Condo worked each week did not fluctuate below forty and, as such, was not "irregular" for purposes of § 7(f). Sysco therefore had to compensate Condo for working overtime in accordance with § 7(a). Because Condo worked varying amounts of overtime hours, the number of hours that he worked "fluctuated" for purposes of § 787.114. Thus, as the district court concluded, § 787.114 applies in this case. We now address the second issue that Condo raises.

B. *Is section 778.114 a lawful regulation?*

Although § 778.114 applies in this case, Sysco cannot prevail unless the regulation complies with the FLSA. The

Secretary of Labor administers the FLSA. 29 U.S.C. § 204 (1988). Section 778.114, the regulation at the crux of this appeal, is the Secretary's interpretation of § 7(a)(1) of the Act. As we have seen, § 778.114 authorizes the system of compensation that was used by Sysco. Condo asserts, correctly, that a regulation cannot contravene the will of Congress as expressed in a statute. *See, e.g., FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). We therefore must determine whether the Secretary's regulation is a permissible interpretation of § 7(a)(1) of the FLSA.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court established a three-step analysis for judicial review of an agency's interpretation of a statute that it administers. The threshold inquiry is whether Congress clearly expressed its intent in the plain language of the statute. "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The first step in determining the intent of Congress is to examine the plain language of the statute. "The plain language of the statute should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1992) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (When the words of a statute are unambiguous, "judicial inquiry is complete."). In deciding whether the intent of Congress is clear, a court is to employ the traditional rules of statutory construction. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

If the language of the statute is determined to be either ambiguous or silent on the issue, however, the reviewing court is to proceed to a second inquiry: whether Con-

gress delegated to the agency the authority to make the legal interpretation in issue. *Chevron*, 467 U.S. at 843-44; *see also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411-12 (7th Cir. 1987). If Congress intended no such delegation, the reviewing court must interpret the statute with little deference to the agency's interpretation, for the judiciary is the final authority on issues of statutory construction. *Chevron*, 467 U.S. at 843 n.9. If, however, Congress intended to deputize the agency with the authority to interpret the statute, the reviewing court is to make a third inquiry: "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. So long as the agency's interpretation is reasonable, the court should defer to that interpretation and not impose its own construction on the statute. *Id.*

The language of the FLSA is our starting point. Section 7(a)(1) provides in relevant part that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified *at a rate not less than one and one-half times the regular rate at which he is employed.*" 29 U.S.C. § 207(a)(1) (emphasis added). Congress has expressed unambiguously its intent that an employee receive 150% of his "regular rate" of pay for each hour that he works over forty during a given workweek. But Congress did not express its intent with respect to the precise issue in this case, whether an employer can pay an employee whose hours of work fluctuate for working overtime using a different system of payment than he uses to pay an employee whose hours do not fluctuate. In fact, the Act does not even mention the notion of "fluctuating hours." That is not surprising. It is impossible for Congress to consider every contingency that arises in the workplace. Indeed, as noted above, the "irregular hours" provision, 29 U.S.C. § 207(f), was not part of the FLSA until Congress enacted it in response to the Supreme Court's decisions in *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942) and *Walling v. Halliburton Oil Well Cementing*

Co., 331 U.S. 17 (1947). Because Congress has not spoken to the precise issue in this case, we need to proceed further and determine whether Congress deputized the Secretary of Labor with the authority to interpret § 7(a)(1) of the FLSA.[6]

This need not detain us long. In 29 U.S.C. § 204, Congress explicitly granted the Secretary of Labor the duty of administering the Act. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38, 139-40 (1944). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret § 7(a)(1). *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *Oceana of Florida, Inc. v. United States Dep't of Transp.*, 876 F.2d 1560, 1565 (11th Cir. 1989). The Sec-

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[6] Although the "regular rate" is at the heart of § 7(a)(1), the FLSA does not explain how it is computed. (Section 7(e) helps by telling us what remuneration is and is not included in the regular rate, but stops short of telling us how it is computed. *See* 29 U.S.C. § 207(e).) Nevertheless, how the regular rate is computed is not an issue in this case, for Condo concedes that the formula for computing the regular rate that is set forth in § 778.114 complies with § 7(a)(1) of the FLSA. In his complaint Condo alleged that, pursuant to his contract with Sysco, "he was paid for working in excess of 40 hours per week at the rate of *one-half* his regular hourly rate instead of *time-and-one-half.*" Thus the basis for his complaint was not that his regular rate of pay was incorrectly calculated but rather that he was not paid a high enough percentage of his regular rate for his overtime hours. Section 778.109 states that the regular rate under the FLSA is determined by "dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek which such compensation was paid." The examples in § 778.114(c), which illustrate the concept of a "fixed salary for fluctuating hours," use this same formula.

retary could not, for example, fulfill his duty of evaluating and appraising the provision (*see* 29 U.S.C. § 204(d)(1)) without first reaching an informed conclusion as to the scope of its coverage. Nor could he enforce § 7(a)(1) without interpreting the meaning of "regular rate," which Congress left undefined, or without determining whether systems of payment that Congress did not specifically address comply with the provision. The Secretary's interpretations of the Act are, of course, subject to judicial review. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). But the Secretary cannot be expected to abstain from enforcing § 7(a)(1) until a court has the opportunity to consider what systems of payment do and do not comply with § 7(a)(1).

Because we have concluded that Congress delegated to the Secretary of Labor the power to interpret § 7(a)(1) of the FLSA, we journey to the third inquiry of the *Chevron* analysis, whether the Secretary's regulation, 29 C.F.R. § 778.114 (1992), is based on a permissible construction of § 7(a) of the FLSA. We hold that it is. The regulation provides that: 1) if the hours that an employee works fluctuate above forty hours per week, the employer can agree to pay the employee a fixed salary for *all the hours that the employee works*, and an additional *one-half* of the employee's regular rate for each overtime hour that the employee works; and 2) the "regular rate" is computed by dividing the fixed salary by all the hours worked. As noted above, *see supra* footnote 6, the second point is not an issue in this case; it is the first point that Condo disputes. But it is clear that the regulation is entirely consistent with § 7(a)(1). The effect of § 7(a)(1) is to ensure that an employee who works over forty hours per week will receive 150% of his regular rate (which is his total remunerations—less the statutory exemptions in 29 U.S.C. § 207(e)—divided by the total number of hours that he worked during the week) for each hour of overtime. Under a system of payment like the one that is set forth in § 778.114 an employee who receives a fixed weekly salary for "all hours worked" receives the one and one-

half times his regular rate for his overtime hours that is mandated by § 7(a)(1). The fixed salary compensates the employee for *all* his hours, *the overtime ones included.* He therefore receives 100% of his regular rate for each hour that he worked. As such, he is entitled only to an additional fifty percent of his regular rate for the hours that he worked in excess of forty.[7] True, under the system that is enumerated in § 778.114 the greater number of hours an employee works, the lower his regular rate will be and the less he will receive per overtime hour. But, as the Supreme Court noted in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942), that does not cause the system to run afoul of the FLSA if, as in this case, the regular rate remains constant within each workweek and the employee receives one and one-half his regular rate for each overtime hour.

III. CONCLUSION

The district court properly concluded that the system used by Sysco to compensate Condo for his overtime hours complied with § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1). The district court's grant of summary judgment in Sysco's favor therefore is AFFIRMED.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] The fixed salary must, of course, be sufficiently large to ensure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate under the FLSA. 29 C.F.R. § 778.114(c). That was not an issue in this case, for Condo never worked enough overtime hours to cause his regular hourly rate to fall below the minimum hourly wage rate, which, during the relevant time period was $3.35. 29 U.S.C. § 206(a)(1) (1988 & Supp. III 1991).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 4, 1993

BEFORE:

Honorable JOHN L. COFFEY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable ILANA D. ROVNER, Circuit Judge

No. 92-3684

RALPH CONDO,

Plaintiff-Appellant

v.

SYSCO CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 802—John F. Grady, Judge.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

APPENDIX B

[Dated October 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RALPH CONDO, Plaintiff,	)	
v.	)	
SYSCO CORPORATION,	)	No. 92 C 802
Defendant.	)	

MEMORANDUM OPINION

This case comes before the court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. For the reasons given below, plaintiff's motion is denied and defendant's motion is granted.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.' " *Cribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light

most favorable to the nonmoving party. *See Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986). Once the moving party has supported its motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e). The adverse party's response, by way of deposition, affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *Id.*

FACTS

The dispositive facts are not in dispute. On March 23, 1984, plaintiff, Ralph Condo, entered into a written employment contract with defendant Sysco Corporation ("Sysco"). Under the terms of the agreement, plaintiff's primary duty was to drive the company limousine as chauffeur to Sysco's chairman of the board—a job which entailed irregular hours and significant overtime. In exchange for his services, plaintiff received a fixed salary of $400.00 per week, plus overtime pay for all hours worked in excess of his regular 40 hour week. The amount of overtime pay was calculated by dividing plaintiff's fixed weekly salary of $400.00 by the total number of hours he worked each week to yield a hourly rate of pay for the workweek. All hours plaintiff worked in excess of 40 were then compensated at 50 percent of this hourly rate. For clarification purposes, the agreement included the following illustration as to how plaintiff's overtime pay was to be computed:

Hours Worked	Base Pay	Hourly Rate	Overtime		Total Pay
50	$400	$ 8.00	$4.00 × 10 =	$40.00	$440.00
58	400	6.90	$3.45 × 18 =	62.10	$462.10
55	400	7.27	$3.64 × 15 =	54.60	$454.60
40	400	10.00	----------		$400.00
60	400	6.67	$3.33 × 20 =	66.60	$466.60
53	400	7.55	$3.77 × 13 =	49.01	$449.01

Both parties agree that plaintiff was compensated in accordance with the above pay system from March 23, 1984, until October 2, 1986, during which time he received a total of $6,195.15 in overtime pay. However, plaintiff now alleges that Sysco's overtime pay system was invalid under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §207(a) *et seq.*, and under the parallel Illinois statute, Ill. Rev. Stat. ch. 48, ¶ 1004(a), and seeks back wages of approximately $12,000.00. Defendant Sysco contends that the overtime pay system used to compensate plaintiff was in full compliance with state and federal law. Each party has moved for summary judgment on this issue.

DISCUSSION

The State Regulation

The state regulation at issue, Ill. Rev. Stat. ch. 48, ¶ 1004(a), is a position that is parallel to FLSA, 29 U.S.C. § 207(a), and is therefore subject to the same interpretation and application as its FLSA counterpart. *Haynes v. Tru-Green Corp.*, 507 N.E.2d 945, 951 (Ill. App. 4th Dist. 1987) ("[t]he same analysis which applies to a violation of FLSA applies to State law"); *see also, Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1178 (7th Cir. 1987). The Illinois Administrative Code reiterates this

principle, stating that FLSA standards are to be used as guidance in the interpretation of Ill. Rev. Stat. ch. 48, ¶ 1004(a). 56 Ill. Admin. Code, ch. I, § 200.170. Thus, if a party prevails under FLSA, 29 U.S.C. § 207(a) *et seq.*, he necessarily prevails under the parallel state regulation, Ill. Rev. Stat. ch. 48, ¶ 1004(a).

FLSA 29 U.S.C. § 207(a) et seq.

Section 207(a)(1) of the FLSA states that an employee shall not be employed for more than 40 hours in a given week, unless the employee receives compensation for all hours in excess of 40 "at a rate not less than one and one half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). To assist in construing § 207(a)(1), the Wage and Hour Division of the Department of Labor has promulgated Regulation 778.114, which provides in relevant part:

> An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. . . . [S]uch a salary arrangement is permitted by the act . . . if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week.

29 C.F.R. § 778.114(a).

Section 778.114 simply provides employers with a method of determining an employee's regular rate of pay when the employee's hours fluctuate from week to week. Having determined an employee's regular, hourly rate of pay in accordance with § 778.114, the employer is then able to properly compensate overtime hours in compliance with § 207(a)(1). Though the formula for overtime compensation outlined by § 778.114(a) results in lower earnings per hour as the number of hours increases, FLSA permits its implementation as long as there is a "clear mutual understanding of the parties." 29 C.F.R. § 778.114(a); *see also Overnight Motor Co. v. Missel*, 316 U.S. 572 (1942) (regular hourly rate for an employee working irregular hours at a fixed salary is calculated by dividing the weekly salary by the total number of hours worked in that week); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986); *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976).

In an attempt to avoid application of 29 C.F.R. § 778.114(a) to this case, plaintiff argues that he falls outside the regulation because he lacked a "clear mutual understanding" of his overtime compensation plan. *See* Plaintiff's Motion for Summary Judgment, Verification of Plaintiff Ralph Condo, at 2 ("[t]he way my wages were calculated was never clear to me"). Though plaintiff is correct in noting that a threshold requirement of § 778.114(a) is that parties share a "clear mutual understanding" regarding overtime compensation, the undisputed facts of this case indicate that such an understanding existed. Plaintiff admits he understood his job required varying periods of overtime, and that the more overtime he worked, the less he would be paid for it. *Id.* at 2. He also admits entering into a written employment contract with terms that mirrored the fluctuating compensation plan detailed by 29 C.F.R.

§ 778.114(a) (i.e., a fixed weekly salary for all hours worked, plus one-half the weekly hourly rate for all hours worked in excess of 40 per week). In addition, the employment contract signed by plaintiff contained a chart illustrating exactly how plaintiff's overtime pay would vary in relation to the number of hours he worked each week. Courts have held that where an employee has signed and acknowledged an explanatory form indicating how FLSA's fluctuating compensation plan operates, a "clear mutual understanding of the parties exists." *Highlander*, 805 F.2d 644, 648 (6th Cir. 1986); *see also Haynes*, 507 N.E.2d at 950 (Ill. App. 4th Dist. 1987) (clear mutual understanding exists where employee knows his position requires overtime, and that the more overtime he works, the lower the rate of pay). In light of the above, this court holds that plaintiff and defendant shared a "clear and mutual understanding" regarding the nature of plaintiff's overtime compensation, as required by 29 C.F.R. § 778.114. Hence, plaintiff's overtime payments were in compliance with 29 U.S.C. § 207(a) and Ill. Rev. Stat. ch. 48, ¶ 1004(a).

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

DATED: October 26, 1992

ENTER: /s/ John F. Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RALPH CONDO, Plaintiff,	)	
v.	)	
	)	No. 92 C 802
SYSCO CORPORATION,	)	
Defendant.	)	

JUDGMENT ORDER

This cause came on to be heard on the cross motions of the parties for summary judgment, and the court having considered the pleadings in the action, and having found that there is no genuine issue of material fact to be tried, and having concluded that defendant Sysco Corporation is entitled to a judgment as a matter of law, it is hereby

ORDERED AND ADJUDGED that judgment is entered herein in favor of defendant Sysco Corporation and against the plaintiff Ralph Condo.

DATED: October 26, 1992

ENTER: /s/ John F. Grady
United States District Judge

APPENDIX C

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"

. . . .

§778.114 Fixed salary for fluctuating hours:

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never

in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

APPENDIX D

§778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f):

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. . . . Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption.

APPENDIX E

(Letterhead Of)

CFS Continental
Executive Offices
100 South Wacker Drive
Chicago, Illinois 60606
(312) 368-7500

March 23, 1984

Ralph A. Condo
3726 S. 59th Avenue
Cicero, IL 60650

Dear Ralph:

This letter will confirm your employment with CFS Continental to begin officially on March 23, 1984, as Chauffeur for our Chairman of the Board, Robert Cohn.

To effect a smooth transition, we request that you be available on Friday, March 23, 1984, to work with Robert Chavez and learn the responsibilities and procedures for the Chauffeur position. Beginning on March 26, 1984, you will have full responsibility for this position.

You will remain on duty until Mr. Cohn has completed his business for the day. While not performing the Chauffering function, your time will be spent in the Corporate Mailroom, performing such tasks as necessary.

We have agreed to a starting salary of $400.00 per week for all hours worked. You will receive half (½) of the weekly hourly rate on all hours worked in excess of 40 per week. Listed below are examples of how the pay scale will work:

Examples

Hours Worked	Base Pay	Hourly Rate	Overtime		Total Pay
50	$400	$ 8.00	$4.00 × 10 =	$40.00	$440.00
58	400	6.90	$3.45 × 18 =	62.10	462.10
55	400	7.27	$3.64 × 15 =	54.60	454.60
40	400	10.00	----------		400.00
60	400	6.67	$3.33 × 20 =	66.60	466.60
53	400	7.55	$3.77 × 13 =	49.01	449.01

You will participate in the CFS benefit programs: medical/dental insurance, life insurance, Profit Sharing/Stock Bonus Plans, etc., as you complete your eligibility periods. You will also have an opportunity to enroll in the voluntary benefit program if you wish.

Ralph, we are looking forward to having you as a member of the CFS family. If you have any questions at any time, please feel free to ask, and we will be happy to answer.

Sincerely,

/s/ Carl E. Frank
Carl E. Frank
Vice President, ISD/Logistics

CEF/psm/2632C

cc: R. Pirsein

Position Accepted:

/s/ Ralph A. Condo
(Ralph A. Condo)

Supreme Court, U.S.
FILED
JAN 14 1994
OFFICE OF THE CLERK

(2)

No. 93-707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RALPH CONDO,

Petitioner,

v.

SYSCO CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT SYSCO CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Whether the Court of Appeals correctly held that 29 C.F.R. § 778.114 (1992) applies in this case to Petitioner's employment contract, and, if so, whether that regulation complies with Section 7(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 207(a)(1) (1988).

STATEMENT REQUIRED BY RULE 29.1

Sysco Corporation has no parent company and no subsidiaries except wholly owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION RESTATED	i
STATEMENT REQUIRED BY RULE 29.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. There Is No Conflict Between Circuits	6
II. The Decision Below Does Not Eliminate Any Protection Afforded Employees By The Fair Labor Standards Act	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Condo v. Sysco Corp., 1 F.3d 599 (7th Cir. 1993) .. 2, 3, 4, 5

Marshall v. Hamburg Shirt Corp., 577 F.2d 444 (1978) 5, 6, 7, 8

Overnight Motor Transp. Co., Inc. v. Missel, 316 U.S. 572 (1942) 7

Yadav v. Coleman Oldsmobile, Inc., 538 F.2d 1206 (1976) 5

Statutes and Regulations

Supreme Court Rule 10.1 8

29 C.F.R. § 778.114 (1992) ..... i, 5, 7

29 C.F.R. § 778.403 (1993) 7, 8

29 U.S.C. § 207(a)(1) (1988) ..... i, 1, 4

29 U.S.C. § 207(b), (g), (i), (j), (k), (m), (n), (o) and (q) 5

29 U.S.C. § 207(f)(2) (1988) 5

No. 93-707

IN THE

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OCTOBER TERM, 1993

RALPH CONDO,

Petitioner,

v.

SYSCO CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT SYSCO CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case the Court of Appeals held that the system used by Respondent to compensate Petitioner for his overtime hours under a written agreement between Petitioner and Respondent complied with § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988). That holding does not conflict with the holding of any other court, and is simply a routine application of settled principles to the particular facts of this case.

COUNTERSTATEMENT OF THE CASE

Summary of Facts

Although Petitioner has set forth his view of the case, the United States Court of Appeals for the Seventh Circuit objectively found the facts to be as follows:

> On March 23, 1984, Condo entered into a written employment contract with Sysco Corporation. Under the terms of the contract, Condo's duties were serving as chauffeur for Sysco's chairman of the board and working in the company's mail room. The job entailed significant overtime. In exchange for his services, Condo received a fixed salary of $400 per week for all hours worked plus overtime pay for all hours worked in excess of forty. The amount of overtime pay was calculated by dividing Condo's fixed weekly salary of $400 by the total number of hours that he worked each week to yield an hourly rate of pay for the workweek. All hours that Condo worked in excess of forty were compensated at fifty percent of this hourly rate. For purposes of clarification, the employment contract included illustrations of how Condo's overtime pay was to be calculated.[1]
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> Condo was paid for his services in accordance with the terms of this contract from March 23, 1984, until October 2, 1986.[2] In March of 1991 Condo brought an action against Sysco, alleging that the system it had used to calculate his compensation violated § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988), and the parallel section of the Illinois Minimum Wage Law, 820 ILCS 105/4a(1) (1993). Section 7(a)(1) of the FLSA provides that an employee shall not be employed for more than forty hours in a given week unless the employee receives compensation for all hours in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed." The language of the Illinois law is substantially the same. Condo argued that the system of payment for

overtime in the contract violated the federal and state laws because under the system he was paid for his overtime hours not at a rate of one and one-half times the hourly rate of pay as is mandated by these laws, but rather at a rate of only one-half his hourly rate of pay. Each party moved for summary judgment, and the district court entered judgment in Sysco's favor. The court found that the system of payment was consistent with § 7(a)(1) of the FLSA and its counterpart under Illinois law, and furthermore, that the system was explicitly authorized by 29 C.F.R. § 778.114 (1992), a regulation promulgated by the Department of Labor to help explain § 7(a), and by Illinois Administrative Code tit. 56, § 200.420(f) (1991), the corresponding state regulation. This appeal followed.

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[1] For example, the chart illustrated how Condo's total salary for weeks during which he worked for fifty hours would be $440: For fifty-hour workweeks (as for all workweeks) Condo's base pay would be $400. Overtime pay would be one-half of the hourly rate (i.e., ½ of fifty hours divided into $400, or $4.00), multiplied by the ten hours of overtime worked, which results in a sum of $40.00. This overtime pay added to the base pay results in the total weekly salary of $440. For sixty-hour weeks, the chart explained that Condo's total salary would be $400 + (½ ($400/60 hours)) x 18 hours, or $466.60. The chart also provided examples for workweeks of fifty-eight hours, fifty-five hours, forty hours, and fifty-three hours.

[2] On October 2, 1986, Sysco fixed Condo's hourly rate for regular time at $9.00 and his hourly rate for overtime at one and one-half of this figure, or $13.50.

Condo v. Sysco Corp., 1 F.3d 599, 600-01 (7th Cir. 1993), Appendix to Petition, A-2 through A-3.

Clarification or Distinction of Other Facts and Statements

(1) Petitioner's statement (Petition, p. 3) that the parties "agree that he received overtime for these overtime hours at a rate of less than 'one-half time' " is incorrect and unsupported by anything in the record. Although Petitioner does not explain what he means by "one-half time," Respondent has never agreed that Petitioner was paid for hours in excess of forty in any workweek at any rate other than the statutorily required one and one-half times the regular rate at which he was employed during that workweek.

(2) Petitioner's characterization (Petition, p. 3) of Respondent's successful contention in the courts below as being "despite the wording of the Fair Labor Standards Act," and "despite the failure of the contract to qualify for the sole statutory exception cited hereinabove," is legally incorrect because Respondent's successful contention in those courts was and is supported by § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988).

(3) Petitioner's statement (Petition, p. 4) that his contract set his overtime hourly pay "at less than one-half the hourly rate at which his first 40 hours' work of each week was calculated" is legally incorrect and unsupported by anything in the record, because under § 7(a)(1) of the Act the "hourly rate at which his first 40 hours' work of each week was calculated" is a meaningless concept.

(4) Petitioner's statement (Petition, p. 4) that the Court of Appeals below "acknowledged that the sole *statutory* exception to the time-and-one-half requirement of § 7(a) of the . . . Act is § 7(f)" is factually and legally incorrect. The Court of Appeals acknowledged only that § 7(f) of the Act provides "an exception" to § 7(a)'s requirement of

payment of time and one-half an employee's regular rate for hours worked in excess of forty in a week. 1 F.3d 599, 602, Appendix to Petition, A-5. The Act provides other exceptions to the overtime requirements of § 7(a)(1). *See* 29 U.S.C. § 207(b), (g), (i), (j), (k), (m), (n), (o) and (q).

(5) Petitioner's statement (Petition, p. 5) that for an employee employed pursuant to an agreement authorized by § 7(f) of the Act "his hours in excess of forty are considered to have been paid by the fixed weekly sum" is unsupported by anything in the record and is legally incorrect because, under § 7(f), such an agreement may provide a weekly guaranty of pay only for not more than sixty hours based on the specified rates. 29 U.S.C. § 207(f)(2) (1988).

(6) Petitioner's statement (Petition, p. 5) that Sysco "relied upon 29 C.F.R. § 778.114 as providing different and independent exception to the 'time-and-one-half' mandate of § 7(a)" is not supported by anything in the record and is incorrect. Respondent never has asserted, and does not now assert, that 29 C.F.R. § 778.114 provides an exception to the time and one-half requirement of § 7(a) of the Act. That regulation simply sets forth the permissible, proper method of calculating an employee's § 7(a) regular rate and overtime pay under the factual circumstances set forth in the regulation and which existed under the employment contract between Petitioner and Respondent in this case.

(7) Petitioner's statement (Petition, p. 6) that the Court of Appeals' decision in this case, and that of the Court of Appeals for the Fifth Circuit in *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (1976), are contrary to the decision in *Marshall v. Hamburg*, 577 F.2d 444 (8th Cir. 1978), is legally incorrect, as explained in this brief, *infra*, at pages 6-7.

REASONS FOR DENYING THE WRIT

Neither of the reasons asserted by Petitioner as a basis for granting a writ of certiorari is a valid reason for doing so. The decision of the Court of Appeals below does not conflict with the terms of the FLSA, and is not inconsistent with the decision in *Marshall v. Hamburg*, 577 F.2d 444 (8th Cir. 1978). Nor does the decision below eliminate any protection afforded employees by the FLSA overtime provisions.

I. There Is No Conflict Between Circuits.

In asserting a conflict between the Circuit Court of Appeals decision below and that of the Eighth Circuit Court of Appeals in *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (1978), Petitioner simply misreads the *Hamburg* decision. There is no conflict between the two decisions.

In *Hamburg*, the Court of Appeals held that the contractual agreement pay plans there in issue were not valid under FLSA § 7(f) because the duties of the employees did not necessitate irregular hours of work, as required by FLSA § 7(f), and because those plans did not compensate weekly hours in excess of 40 at one and one-half times a specified regular rate. *Id.* at 447. The *Hamburg* plans guaranteed specified numbers of hours of pay per week, ranging from 45 to 50, whether the employees worked those hours or not. The Eighth Circuit correctly held that the employees' guaranteed weekly pay amounts, rather than the contractually specified weekly salaries, which never were actually paid because of the guaranties, should be considered the fixed weekly wages. *Id.*

The remedy in *Hamburg*, under § 7(a) of the FLSA, was to determine the employees' regular rates by dividing their guaranteed weekly pay amounts, rather than their contractually specified weekly salaries, by the number of

hours actually worked in each week, and then to pay the employees additional compensation for all hours worked in excess of 40 each week at one-half the regular rates thus determined, in addition to their guaranteed weekly pay amounts. The remedy ordered in *Hamburg* is precisely the method required by 29 C.F.R. § 778.114 and used in determining Petitioner's overtime compensation in this case.

The difference between *Hamburg* and this case is that in the former "the practical effect of the guaranty is to allow the employer to pay the same compensation each week even though the employee works a varying number of hours," 577 F.2d at 446, while in this case Petitioner was paid different amounts of weekly compensation depending on the number of overtime hours he worked each week.

Thus, there is no conflict between the Courts of Appeals decisions here and in *Hamburg*. FLSA § 7(f) and 29 C.F.R. § 778.403 did not apply in either case. FLSA § 7(a)(1) and 29 C.F.R. § 778.114 applied in both cases.

II. The Decision Below Does Not Eliminate Any Protection Afforded Employees By The Fair Labor Standards Act.

Petitioner is dead wrong in asserting that the Court of Appeals decision allows employers to pay employees less overtime pay than is required by FLSA § 7(a). Petitioner was properly paid overtime pay under that section as specified by 29 C.F.R. § 778.114. This Court long ago approved the method, now embodied in 29 C.F.R. § 778.114, of determining an employee's regular rate under FLSA § 7(a) for working fluctuating hours each week. *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 579-80 (1942).

The reason neither the District Court nor the Court of Appeals in this case discussed 29 C.F.R. § 778.403 is because that regulation applies only to pay arrangements where an employer pays the "*same total compensation each week* to an employee who works overtime and whose hours of work vary from week to week." 29 C.F.R. § 778.403 (1993) (emphasis supplied). Petitioner was not paid the same total compensation each week. His total weekly compensation varied depending on how many hours over 40, if any, he worked each week. Thus, 29 C.F.R. § 778.403 is inapplicable here.

CONCLUSION

Because there is no conflict between the Court of Appeals decision in this case and the decision of the Eighth Circuit in *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (1978), and because there are no other "special and important reasons" for granting a writ of certiorari in this case, S. Ct. R. 10.1, the Petition for such a writ should be denied.

Respectfully submitted,

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